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INTEREST ANALYSIS, STATE SOVEREIGNTY, AND FEDERALLY-MANDATED CHOICE OF LAW IN "MASS TORT" CASES

Robert A. Sedler*

I. PRELUDE: MODERN CHOICE OF LAW MEETS THE "MASS TORT"

In the thirty years that have gone by since *Babcock v. Jackson*¹ ignited the choice-of-law revolution in this country, there has emerged what may be called a "modern choice-of-law consensus" in conflicts tort cases. In the years after *Babcock*, and continuing to the present time, there has been fierce academic controversy over the preferred approach to choice of law. However, the courts that have abandoned the traditional approach to choice of law, as the overwhelming number of them have done,² have had relatively little difficulty in resolving the actual conflicts tort cases that have come before them. The courts have also reached fairly uniform results in the different fact-law patterns that are presented in conflicts tort cases,³ regardless of which "modern" approach to choice of law they purport to follow.⁴ I have demonstrated that these results are generally consistent with the results that would be reached under the interest analysis approach to choice of law as developed by Brainerd Currie⁵

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¹ 191 N.E.2d 279 (N.Y. 1963).

² At the present time, there are no more than 13 states that continue to follow the traditional approach in all respects. See the listing of states in Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 373 & n.112 (1992). The article lists 15 states, including South Dakota and Tennessee, both of which abandoned the traditional approach after the article went to press. See *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63 (S.D. 1992); *Hataway v. McKinley*, 830 S.W.2d 53 (Tenn. 1992).

³ See the discussion of fact-law patterns in conflicts tort cases in Robert A. Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 980-81 (1977).

⁴ See generally ROBERT A. SEDLER, *ACROSS STATE LINES: APPLYING THE CONFLICT OF LAWS TO YOUR PRACTICE* 50-58 (1989); Sedler, *supra* note 3, at 1032-41; see also Borchers, *supra* note 2 (analyzing the results in conflicts tort cases in terms of forum law, recovery law, and local favoring law). Professor Borchers concludes that: "Courts do *not* take the new approaches seriously. Because all of the competitors to the First Restatement start from different analytical premises, if courts were faithful to their tenets they would inevitably generate different result patterns. Yet in practice the outcomes are largely indistinguishable." *Id.* at 379.

⁵ See generally BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

and refined by his followers.⁶ Most clearly this is so with respect to the "false conflict" and the "true conflict." In the false conflict situation, where only one state has a real interest in having its law applied to implement the underlying policy of that law, the courts have invariably applied the law of the only interested state. In the true conflict situation, where both of the involved states have a real interest in having their laws applied to implement the conflicting policies reflected in those laws, the forum will usually apply its own law in order to implement its own policy and interest.⁷

In practice, then, the modern choice-of-law revolution sparked by *Babcock* has witnessed the emergence of interest analysis as the operative approach to choice of law in conflicts tort cases today.⁸ The underlying policies and the interests of the respective states in having their laws applied to implement those policies have now become the dominant considerations in resolving conflicts tort cases.⁹ Today then, choice of law in conflicts tort cases has arrived at a point far distant from where it was in the pre-*Babcock* era, when all courts adhered to the broad, state-selecting rules of the traditional approach.

In the thirty years since *Babcock*, conflicts tort cases have also undergone their own "revolution". At the time of *Babcock*, most conflicts tort cases presented relatively simple fact-law patterns. Most of the conflicts questions arose in interstate automobile accident cases in which frequently, as in *Babcock*, two residents of the same state would be involved in an automobile accident in another state; less frequently would the plaintiff and defendant reside in different states. Occasionally, there would be a case involving an interstate plane crash or a products liability claim. In virtually all of the conflicts cases that arose in practice, the facts were not complicated and the choice-of-law issue was fairly straightforward.

⁶ See, e.g., Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493 (1985); Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181 (1977).

⁷ See the discussion and review of cases in Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics,"* 34 MERCER L. REV. 593, 635-43 (1983).

⁸ For a further discussion of the application of interest analysis by the courts in practice, see Robert A. Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a Response*, 23 U.C. DAVIS L. REV. 865, 891-94 (1990) [hereinafter Sedler, *Response to Juenger*].

⁹ It may also be noted that the policies and interests reflected in the laws of the involved states are a relevant, if not controlling, consideration in virtually all of the other modern approaches to choice of law.

The choice-of-law issues in those cases also reflected the substantive tort law differences that existed at that time. By far the largest number of conflicts tort cases, as exemplified in *Babcock* and the other "casebook standards," revolved around a guest statute or other traditional form of tort immunity. Most of the other conflicts tort cases of that era involved issues of contributory fault or general limitations on wrongful death recovery. Very few states have guest statutes today, and the other traditional forms of tort immunity have been abolished in most states. So too, most states have replaced contributory negligence with some form of comparative negligence. General limitations on wrongful death recovery have ceased to exist. Today, conflicts tort cases are no longer limited to the simple two-party interstate automobile accident that was the staple of the *Babcock* era. Moreover, the now superseded substantive tort law differences that gave rise to the conflicts issues in the *Babcock* era have been replaced by new differences, reflecting the changing nature of modern tort problems and modern tort law, as the law has developed in response to those problems. Today, many of the conflicts tort cases are products liability cases, and products liability law differs considerably from state to state. The differences in products liability law relate not only to strict liability versus a negligence standard, but to matters such as "market share liability," products liability "statutes of repose," and the availability of punitive damages. So too, in the wave of the tort reform movement, a number of states have enacted laws imposing caps on tort recovery, particularly for non-economic loss, in all or some kinds of cases;¹⁰ other states have strongly resisted the tort reform movement and have refused to cap the recovery of tort damages. And while most states presently recognize some form of comparative negligence, the rules of comparative negligence differ considerably, especially over the question of whether a plaintiff who is "more at fault" is completely barred from recovery.

However, the changing nature of the choice-of-law issues that arise today in conflicts tort cases should not, in any way, affect the modern choice-of-law consensus that has emerged in the years following *Babcock*. If, as I maintain, and as the courts seem to agree in practice, interest analysis is the preferred approach to resolving the issues presented in conflicts tort cases, it remains the preferred approach regardless of the particular substantive law differences that give rise to the conflicts issues in today's tort cases. A state's interest in apply-

¹⁰ See generally LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 1.08[4][j] (1993) (discussing recovery limiting statutes).

ing its products liability law or law capping the recovery of tort damages is predicated on the same factors that would have given rise to an interest in applying its guest statute or its rule of contributory negligence at an earlier time.

The nature of tort litigation has also changed considerably since the *Babcock* era. The cutting edge of tort litigation today is the "mass tort". In the mass tort, there are hundreds and in some cases, even thousands of victims, some of whom will suffer their injuries in the future and may not yet have been born. The victims will reside in many different states and possibly in some foreign countries. In some instances their injuries may have occurred in a state other than the state in which they reside when the injuries surface. Likewise, there may be multiple defendants, doing business in many different states and possibly in foreign countries. Thus, the acts of the various defendants relied on to support liability may have occurred in different states; not all the defendants in a mass tort case may be subject to jurisdiction in all of the same states.

In actuality, there are two kinds of mass tort cases, the single disaster case, and the multi-exposure case. In the single disaster case, a large number of persons residing in different states are killed or injured in a single disaster, such as an airplane crash. Typically, the victims or their beneficiaries will bring a negligence claim against the airline and a products liability claim against the manufacturer of the airplane, and sometimes against the manufacturer of a component part as well.¹¹ The multi-exposure case, or "mass toxic tort" case, involves claims of a large number of persons exposed to a product that has caused an illness or condition, such as in asbestos, Agent Orange, Dalkon Shield and DES litigation. The problems in these cases are complicated by the fact that a number of different manufacturers may have manufactured the product, so that it is not always possible to identify the individual manufacturer whose product caused the injuries to the particular victim. The problems are further complicated

¹¹ See, e.g., *In re Disaster at Detroit Metro. Airport* on August 16, 1987, 750 F. Supp. 793 (E.D. Mich. 1989). That case resulted from the crash on takeoff from Detroit Metropolitan Airport of a Northwest Airlines DC-9, designed and manufactured by McDonnell-Douglas Corporation in California, on a flight from Detroit, Michigan to Phoenix, Arizona. *Id.* at 795. Northwest has its principal place of business in Minnesota, but Detroit Metropolitan Airport is one of its "hubs," and over 60% of the daily departures from Detroit Metropolitan are Northwest flights. *Id.* at 807 & n.22. One hundred and fifty seven claims arising from the disaster were filed in federal courts in Michigan, Arizona, California, and Florida. *Id.* at 796. The Judicial Panel on Multidistrict Litigation ordered the consolidation and transfer of all the cases to the United States District Court for the Eastern District of Michigan. *Id.* at 795.

because the injuries may not appear for a number of years, and some potential victims, as in the DES cases, have yet to be born.¹²

Our system of separate state courts, interacting with the fact that many defendants do business on a nationwide basis, leads to the result that a large number of separate suits arising out of a mass tort may be brought in a number of different state courts throughout the country. In cases where there is complete diversity between all the plaintiffs and all the defendants, the suits can also be brought in,¹³ or removed to,¹⁴ the federal courts. At the present time, there is no mechanism for consolidating the separate suits brought in the various state courts. The individual suits brought in the different federal courts can be consolidated for trial before a single federal court through the processes of the Judicial Panel on Multidistrict Litigation.¹⁵

Because of the multiple suits in different state and federal courts arising from the mass tort, and because of the differences in substantive products liability law and other aspects of tort law from state to state, the mass tort is said to create "choice of law litigation of staggering complexity."¹⁶ Each state court in which suit is brought will have to resolve the choice-of-law issues resulting from the fact that multiple plaintiffs and defendants reside in different states and that the acts relied on to establish liability and the harm that those acts are alleged to have caused may have occurred in different states. The necessity of resolving these choice-of-law issues is not eliminated in those federal court cases that are consolidated before a single court by the Judicial Panel on Multidistrict Litigation, because federal courts are required to apply the conflict-of-laws rules of the state in which they sit.¹⁷ When a case is transferred to another federal court, the transferee court is required to apply the conflict-of-laws rules of the state from which the case has been transferred.¹⁸ So, when mass

¹² For an illuminating empirical study of the complexity of multi-exposure cases, see Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475 (1991).

¹³ See 28 U.S.C. § 1332 (1988).

¹⁴ See 28 U.S.C. § 1441 (1988).

¹⁵ See 28 U.S.C. § 1407 (1988).

¹⁶ Robert W. Kastenmeier & Charles G. Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature*, 73 MARQ. L. REV. 535, 557 (1989) (quoting *Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st and 2nd Sess. 228 (1987-88)).

¹⁷ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

¹⁸ *Van Dusen v. Barrack*, 376 U.S. 612 (1964). This rule applies regardless of which party initiated the transfer. *Ferens v. John Deere Co.*, 494 U.S. 516 (1990).

tort cases are consolidated before a single federal court by the Judicial Panel on Multidistrict Litigation, the transferee court must apply the law that would have been applied by the transferring court in each separate case that has been transferred to it.

II. THE "LAW OF A SINGLE JURISDICTION" RULE: A RETURN TO THE "PLACE OF THE WRONG" RULE IN MASS TORT CASES

The proposed "progressive" solution to the problems generated by mass tort litigation is to provide for the consolidation of mass tort litigation before a single federal court and to require the federal court to decide all of the substantive issues in the case under a federally-imposed "law of a single jurisdiction" rule. As the American Bar Association Commission on Mass Torts has stated: "[s]eparate adjudication of individual tort claims arising from a single accident or use of or exposure to the same product or substance is inefficient and wasteful, seriously burdens both state and federal judicial systems, poses unacceptably high risks of inconsistent results, and contributes to public dissatisfaction with the tort law system and the legal profession."¹⁹ Federal legislation providing for the consolidation of mass tort litigation before a single federal court and the application of a federally imposed "law of a single jurisdiction" rule to govern all of the substantive issues arising from the mass tort in all of the consolidated cases has been proposed in Congress, most recently in the form of the Multiparty, Multiforum Jurisdiction Act of 1991.²⁰

¹⁹ ABA Comm'n on Mass Torts, Revised Final Report and Recommendations 12 (Nov. 1989) (on file with the *Albany Law Review*). A proposal to accept the Report was defeated by the House of Delegates in February, 1990. A.B.A., SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION 4 (1990).

²⁰ See H.R. 2450, 102d Cong., 1st Sess. (1991). The bill, H.R. 2450, passed the House during the last session, as did predecessor bills in previous sessions, but did not make it out of the Senate Judiciary Subcommittee on Courts and Administrative Practice. I testified in opposition to the bill at a Senate Subcommittee Hearing on January 28, 1992. In November, 1989, Professor Aaron Twerski of Brooklyn Law School and I presented written testimony before the House Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice, in opposition to a predecessor bill, The Multiparty, Multiforum Jurisdiction Act of 1989. H.R. 3406, 101st Cong., 1st Sess. (1989). Professor Twerski and I prepared a law review article concurrently with our presentation of that testimony. Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76 (1989) [hereinafter, Sedler & Twerski, *Sacrifice Without Gain*]. Former U.S. Representative Robert W. Kastenmeier (D. Wis.), the sponsor of the 1989 bill, and Charles G. Geyh, Counsel to the House Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice, responded to our article, see Kastenmeier & Geyh, *supra* note 16, to which Professor Twerski and I responded in turn. Robert A. Sedler and Aaron D. Twerski, *State Choice of Law in Mass Tort Cases: A Response to "A View from the Legislature,"* 73 MARQ. L. REV. 625 (1990) [hereinafter, Sedler & Twerski, *Response*]. While Professor Twerski

While the consolidation bills that have been introduced in Congress cover only the single disaster case,²¹ the proposals presented by the American Bar Association Commission on Mass Torts would also cover multiple exposure to a single product line.²² It appears that the ultimate objectives of proponents of consolidation is to have both the single disaster cases and the multi-exposure cases consolidated before one federal court, and to impose a federally-mandated "law of a single jurisdiction" rule in both kinds of cases.

The thesis of this Article is that the proposed "law of a single jurisdiction rule" in mass tort cases is highly undesirable both from a choice-of-law perspective and from a state sovereignty perspective. This Article will not directly address the narrower question of whether consolidation of mass tort cases is necessary or desirable. Rather, it maintains that even if consolidation of mass tort cases is eventually required by federal law, consolidation should be accomplished without displacement of state choice of law. In mass tort cases that have been consolidated, the federal court should be required to follow state choice-of-law rules and reach the same result that would be reached by the courts of the state from which the case has been transferred. This would keep in place the approach that is now followed in diversity cases where there has been a transfer of venue from one federal court to another, including cases transferred by the Judicial Panel on Multidistrict Litigation.²³

What is fascinating to me, in discussing mass torts in the context of this *Babcock* symposium, is that the purportedly "progressive" so-

would not concur with everything I say in the present Article (particularly the matter of interest analysis being the preferred approach to choice of law), this Article borrows copiously from the articles that Professor Twerski and I co-authored, and reflects our joint view in opposition to a federally-imposed "law of a single jurisdiction rule" to determine choice of law in mass tort cases.

²¹ The Multiparty, Multiforum Jurisdiction Act of 1991 applies to any civil action involving minimal diversity between adverse parties arising from a single accident in which at least 25 natural persons have died or incurred injury, and where either (1) one defendant resides in a state other than the state where the accident occurred, or (2) any two defendants reside in different states, or (3) substantial parts of the accident took place in different states. H.R. 2450, 102d Cong., 1st Sess. § 2 (1991). Each victim must also be claiming damages in excess of \$50,000, which will always be so in personal injury or death cases. *Id.* See generally *Hearings on H.R. 2450 Before the Subcomm. on Courts and Administrative Practice of the Senate Judiciary Comm.*, 102d Cong., 2d Sess. (1992). The author testified in opposition to the bill. *Id.* at 70-116, 256-62 (testimony of Professor Robert A. Sedler).

²² ABA Comm'n on Mass Torts, Revised Final Report and Recommendations 12 (Nov. 1989) (on file with the *Albany Law Review*). A proposal to accept the Report was defeated by the House of Delegates in February, 1990. A.B.A., SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION 4 (1990).

²³ See *supra* notes 17-18 and accompanying text.

lution to the mass tort problem, reflected in a federally-mandated "law of a single jurisdiction" rule, would *completely overturn* the entire choice of law revolution sparked by *Babcock*, at least as to those cases. The consideration of state policies and interests that is the basis of the modern choice of law consensus would become completely irrelevant in mass tort cases. Choice of law in mass tort cases would almost always return to the long-discredited "place of the wrong" rule. The only variation would be that the "place of the wrong" could be the "place of acting" instead of the "place of harm." In short, in the name of efficiency and consistency, the entire development of modern choice of law over the last thirty years would be cast aside in mass tort cases.

I will now explain why the imposition of "the law of a single jurisdiction" rule in mass tort cases would almost always compel a return to the long-discredited "place of the wrong" rule, with only the variation that the "place of the wrong" could sometimes be the "place of acting." The choice-of-law provision of section 6 of the Multiparty, Multiforum Jurisdiction Act of 1991, provides that in cases consolidated under the Act, the federal judge shall "enter an order designating the single jurisdiction whose substantive law is to be applied,"²⁴ and that in making that determination the federal judge "shall not be bound by the choice of law rules of any State."²⁵ In making that decision, the judge is directed to consider three factual contacts and two general considerations, "according to their relative importance with respect to the particular action."²⁶ The three factual contacts are "the place of the injury," "the place of the conduct causing the injury," and "the principal places of business or domiciles of the parties."²⁷ The two general considerations are "the danger of creating unnecessary incentives for forum shopping," and "whether the choice of law would be reasonably foreseeable to the parties."²⁸ At first glance, the choice-of-law provision of section 6 appears to be a combination of the primary factors used to determine the state of the most significant relationship in tort cases under section 145 of the *Second Restatement*,²⁹ with the addition of some of the general choice-of-law considerations set out in section 6 of the *Second Re-*

²⁴ H.R. 2450, 102d Cong., 1st Sess. § 6 (1991).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1969).

statement.³⁰ The federal judge ultimately would have broad discretion selecting the "law of a single jurisdiction" in the particular mass tort case.

In point of fact, however, the judge will have virtually no discretion at all. Because of *constitutional constraints* on which state's law can be selected to apply in a conflicts case, the judge's choice of "the law of a single jurisdiction" will be severely restricted. In most mass tort cases, the only state's law that a federal court would be able to constitutionally apply to determine all the issues and claims of all the different parties in the case would be the law of the state in which the injury occurred, or the law of the state in which the allegedly tortious act took place. Ordinarily those will be the only two possible states with which all of the parties and the underlying transaction will have constitutionally sufficient contacts.

As I have discussed more fully elsewhere,³¹ the Due Process and Full Faith and Credit Clauses impose only minimal limits on which state's law can be selected in a conflicts case. While these limits will rarely prevent a state court from making a decision to apply its own law or the law of another state in a particular case, these limits become highly restrictive when an effort is made to apply the "law of a single jurisdiction" to determine the claims of all the plaintiffs against all the defendants in a mass tort case. This is especially true when, as in the typical mass tort case, multiple plaintiffs reside in a number of various states, and the conduct of the individual defendants has occurred in different states.

The constitutional test for the application of a state's law as set forth by the Supreme Court in *Allstate Insurance Co. v. Hague*,³² is that, "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts [with the parties and the occurrence or transaction], creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."³³ In *Phillips Petroleum*

³⁰ *Id.* § 6.

³¹ See Robert A. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 *HOFSTRA L. REV.* 59, 68-74 (1981).

³² 449 U.S. 302 (1981).

³³ *Id.* at 312-13. Under this test, a state's law may be constitutionally applied where the state has an interest in applying its law to implement the policy reflected in that law and the application of its law is not fundamentally unfair. A state's law may also be applied where that state has sufficient factual contacts with the underlying transaction so that it is reasonable for its law to be applied on the basis of those contacts. But, where the application of a state's law cannot be justified either under an "interest and fairness" test or a "factual contacts" test, such appli-

Co. v. Shutts,³⁴ the Court held that in multiparty cases, the constitutional test controls the application of a state's law to the claim of *each individual party*, even though the suit takes the form of a "nationwide class action."³⁵

The proposed federal act has the effect of converting a mass tort case into a "nationwide class action," and requires the federal court to select the "law of a single jurisdiction" to govern all the claims of all of the parties in that "nationwide class action." As *Shutts* makes clear, however, the fact that a "nationwide class action" is involved is irrelevant with respect to constitutional limitations on selection of the applicable law. The constitutional limitations on selection of a state's law still apply to the claim of each individual party. The interaction of the "law of a single jurisdiction" rule with constitutional constraints on choice of law in multiparty claims will force the federal judge into a choice-of-law straightjacket, compelling the judge to apply the law of the state where the accident occurred, or possibly, the law of the state in which the allegedly tortious act occurred. In short, we will have returned to the "place of the wrong" rule, with the "place of the wrong" sometimes being the "place of acting" instead of always being the "place of harm."

That this will be the effect of such interaction is illustrated by the following typical mass tort case.³⁶ One hundred and fifty California residents leave Los Angeles on a flight to New York, with a stopover in Detroit, Michigan. In Detroit, another twenty-five passengers, all from Michigan, embark for the last leg of the flight to New York. The plane crashes on take-off from the Detroit airport, killing all on board. The allegation is that the crash was due to a design defect in the landing gear. The aircraft was designed and manufactured by Gruman Aircraft in New York. California law imposes a "risk utility" burden on manufacturers in design defect claims, which is widely acknowledged to effectively create strict liability for design defect.³⁷ Under Michigan law and New York law, the manufacturer can rely on "state of the art," and so for practical purposes, can be held liable only for negligence.

cation is arbitrary and thus, constitutionally impermissible. See Sedler, *supra* note 31, at 72-74, 85-92.

³⁴ 472 U.S. 797 (1985).

³⁵ For a more detailed discussion of the holding in *Shutts*, see Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 20, at 100-101.

³⁶ See Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 20, at 101-02.

³⁷ See *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978).

Under the constitutional test set forth in *Allstate* for the permissible application of a state's law, California law could be applied in this situation to determine California victims' claims against Gruman. California has an interest in applying its law to determine the claims of the California survivors, and the application of California law on this issue is not unfair to Gruman, which has a large number of airplanes flying in California, including the airplane involved in the fatal crash. For the same reason, Michigan law could be applied to determine the Michigan victims' claims. In addition, Michigan law could be applied to determine the claims of all the survivors against Gruman, because the accident occurred in Michigan. Similarly, New York law could be applied to determine all these claims, because the airplane was designed and manufactured in New York.

Under the constitutional test set forth in *Shutts*, however, California law could *not* be applied to determine the Michigan victims' claims. Because the Michigan victims were not residents of California, California has no interest in applying its law to determine the claims of their survivors. Furthermore, because the Michigan victims did not board the plane in California, California law cannot be applied to determine these claims on the basis of factual contacts with the underlying transaction. Thus, the mere presence of a single non-California victim who boarded the plane outside of California precludes the application of California law to determine the claims of the California survivors in this case. This amounts to a "single-plaintiff veto" of an otherwise functionally sound choice of law result that doubtless would have obtained if the suit had remained in California—the application of the law of the victim's home state to determine the liability of the manufacturer for an accident arising out of a flight that originated in the victim's home state³⁸—and defeats the strong interest of California in applying its victim-favoring rule in design defect cases for the benefit of California victims.

Under the "law of a single jurisdiction" rule, the only applicable law in this case could be the law of Michigan, where the accident occurred, or the law of New York, where the product was designed and manufactured, both of which are the same and favor the manufacturer. The law of California, the state where most of the victims resided, where the manufacturer did substantial business, and where the trip originated, cannot, in fact, be applied in this case because

³⁸ Cf. *Kilberg v. Northeast Airlines*, 172 N.E.2d 526 (N.Y. 1961) (applying the law of victims' home state which allowed unlimited recovery for wrongful death in interstate airplane crash occurring in airline's home state, the law of which limited recovery for wrongful death).

that law could not constitutionally be applied to determine the claims of the Michigan survivors.³⁹

If, on the other hand, the crash had occurred when the plane took off in California, California law could constitutionally be applied to determine the claims of all the survivors against Gruman and Northwest. As in our example case, the federal court could choose either the place of harm or the place of acting. But suppose that the carrier was a regional airline that did not fly to New York and that the crash occurred on a flight from California to Arizona. In that situation, the federal court would be limited to selecting California law, as the law of the place of harm, because New York law could not constitutionally be selected to govern the survivors' claims against the airline, and only California law could be applied to govern the survivors' claims against both Gruman and the airline.

The next example sees the federal court required to apply the law of the state where the accident occurred in a mass tort arising from a simple bus crash that involves only two states.⁴⁰ Twenty-five Wisconsin senior citizens embark on a three-day trip to Indiana on Greyhound Tours.⁴¹ While the group is in Indiana, an Indiana friend of one of the members of the group joins the tour. While traveling in Indiana, the bus is involved in a collision with an automobile driven by an Indiana resident and all of the passengers are seriously injured. Both the driver of the bus and the driver of the car were negligent, but the allocation of fault between the parties is thirty percent to Greyhound and seventy percent to the Indiana driver, who was driving twenty-five miles over the speed limit. Indiana is one of the relatively few states that has abolished joint tortfeasor liability; Wisconsin retains the traditional common-law joint tortfeasor doctrine. The driver of the Indiana car carries only \$500,000 of liability insurance and has no other significant assets. That amount is \$10,000,000 short of the amount necessary to compensate the severely injured plaintiffs. Greyhound has adequate insurance to cover all claims.

If Indiana law applies here, the twenty-five Wisconsin residents will be limited to thirty percent recovery against Greyhound because

³⁹ The claims of the Michigan survivors are appropriately determined under Michigan law, which does not differ from New York law. The application of Michigan law to determine the claims of the Michigan survivors, and California law to determine the claims of the California survivors, produces a functionally sound result that would be recognized under most modern approaches to choice of law. This result is necessarily precluded under the "law of a single jurisdiction" rule.

⁴⁰ See Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 20, at 102-03.

⁴¹ For conflicts purposes, Greyhound Tours is properly considered a Wisconsin party, because the trip involved its Wisconsin operations.

under Indiana law, the liability of Greyhound is several rather than joint; Greyhound is liable only for its proportionate share of the fault. If Wisconsin law applies, this limitation would not operate to reduce recovery, because Wisconsin still follows joint and several liability. There is no doubt that the Wisconsin plaintiffs would bring suit against Greyhound in Wisconsin, and that Wisconsin would apply its law imposing full liability, as well it should, because both the plaintiffs and the defendant are Wisconsin parties and the accident arose out of a Wisconsin based-trip.⁴²

However, under the "law of a single jurisdiction" rule, the federal court in this case could not constitutionally select Wisconsin law. Because one of the plaintiffs is from Indiana and the accident occurred in Indiana, involving an Indiana driver, Wisconsin law could not constitutionally be selected to govern the claim of the Indiana plaintiff against the Indiana driver.⁴³ This being so, as a constitutional matter, only Indiana law can be the "law of the single jurisdiction" selected to govern the claims of all the plaintiffs. Thus, the court and the parties are forced back to the "place of the wrong" rule. Wisconsin law cannot be applied to govern the liability of a Wisconsin defendant to Wisconsin plaintiffs, and Wisconsin cannot apply its law in order to implement the policy reflected in that law in a case where it has a strong interest in doing so.

A third example will apply the "law of a single jurisdiction" rule to a multi-exposure or "mass toxic tort" case, demonstrating that the only state's law that could constitutionally be applied in such a case is the "law of the place of acting." We will simplify things by having a single manufacturer that manufactured the product in its home state, New York. Instead of having plaintiffs in all fifty states, as is typical in mass toxic tort cases, we will have one group of plaintiffs in California and another group in Michigan. All of the plaintiffs suffered the injuries in their home states. As in our previous New York-California-Michigan example involving the airplane crash, the issue is the standard of liability for design defect claims. Recall that California imposes strict liability for design defect claims, while New York and Michigan impose liability only on the basis of negligence. There

⁴² This is the fact-law pattern of *Babcock*. The *Babcock* decision was followed in Wisconsin two years later in *Wilcox v. Wilcox*, 133 N.W.2d 408 (Wis. 1965).

⁴³ Wisconsin has no interest in applying its law to allow recovery to an Indiana victim against an Indiana driver, where the accident involving that victim had no factual contacts with Wisconsin. Because the application of Wisconsin law could not be sustained under either an "interest" or "fairness" test, or on the basis of factual contacts with the underlying transaction, the application of Wisconsin law would be arbitrary and constitutionally impermissible.

is a conflict between California law and New York law on the point in issue here, and there is no doubt that if the California victims brought suit in California against the New York manufacturer, California would apply its own law.⁴⁴

However, the law of California could not constitutionally be applied to determine the claims of the Michigan victims because California would have no interest in applying its law for the benefit of Michigan victims injured in their home state. Here then, the only state's law that could be constitutionally selected to govern the claims of all the toxic tort victims is the law of the state of manufacture, New York. New York is the only state having factual contacts with respect to the claims of all the victims who reside in different states. Thus, in the "mass toxic tort" case, the "law of a single jurisdiction" rule will invariably mandate the application of the "law of the place of acting" to govern the claims of all the victims, residing in different states, having suffered the harm in their respective home states.

We see then that in both the single disaster case and the multi-exposure case, the "law of a single jurisdiction" rule turns out to be nothing more than a slightly modified "place of the wrong" rule, with the "place of the wrong" potentially being the "place of harm" or "the place of acting." The law of the states where the parties reside or have their principal place of business can *never* be selected as the "law of a single jurisdiction" in mass tort cases. The state where parties reside or have their principal place of business can have relevance, if at all, only as an additional factor to weigh in selecting the place of harm or the place of acting when a choice between those two places as the "law of a single jurisdiction" is constitutionally permissible.⁴⁵

We will use one other "mass toxic tort" case example to illustrate the situation where there is *no* state that could be selected as the "law of a single jurisdiction."⁴⁶ This will occur in a case in which dif-

⁴⁴ See, e.g., *Kasel v. Remington Arms Co.*, 101 Cal. Rptr. 314 (1972) (California products liability law applied in the victim's suit against the manufacturer where the California victim purchased a product in California, manufactured by an out-of-state manufacturer, and was injured while using the product in Mexico); cf. *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976) (California law imposing liability against liquor establishment for harm caused by intoxicated patron applied where a California victim was injured in California by a California driver who became intoxicated at defendant's gambling establishment located across the state line in Nevada).

⁴⁵ As pointed out above, in the "mass toxic tort" case, only the "place of acting" can constitutionally be selected as the "law of a single jurisdiction."

⁴⁶ See Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 20, at 104-05.

ferent manufacturers, operating in different states, are sought to be held liable to groups of victims residing in other states on the same underlying toxic tort claim. We will assume here that the point in issue relates to determining liability on the basis of market share, which some states recognize and others do not.⁴⁷ Again, to simplify matters, we will have one group of victims residing in State A and another groups of victims residing in State B. One company manufactured the product in State C, and another manufactured the product in State D. Both manufacturers do business nationwide. The laws of State A and State C recognize market share liability, while the laws of State B and State D do not.

The law of State A could be constitutionally selected to govern the claims of the State A victims against both manufacturers, but could not be constitutionally selected to govern the claims of the State B victims against the manufacturers, and vice-versa. The law of State C could constitutionally be selected to govern the claims of both the State A and the State B victims against the State C manufacturer, but could not be constitutionally selected to govern their claims against the State D manufacturer. Nor could the law of State D be selected to govern their claims against the State C manufacturer. In this case, because of constitutional constraints on choice of law, we have run out of law. There is no single jurisdiction whose law could constitutionally be selected to govern the claims of all the victims residing in different states against the two manufacturers who manufactured the product in different states.⁴⁸

Because the "law of a single jurisdiction" rule then turns out to be nothing more than a federally-mandated return to the "place of the wrong" rule in mass tort cases, there will have been a counter-revolution in these cases in the name of efficiency and consistency. The choice-of-law revolution and the modern choice-of-law consensus in conflicts tort cases will have been swept aside. Sweeping aside the modern choice-of-law consensus will, of course, bring to an end the use of interest analysis to resolve the choice-of-law issues in mass tort cases. Choice of law in conflicts tort cases will thus become bifur-

⁴⁷ See generally FRUMER & FRIEDMAN, *supra* note 10, § 1.09[5] (discussing market share liability and states that do and do not recognize it).

⁴⁸ In this circumstance, it will be necessary for the federal court to depart from the "law of a single jurisdiction" rule. Section 6 of the Multiparty, Multiforum Jurisdiction Act of 1991 has apparently contemplated such a situation by providing: "If good cause is shown in exceptional cases, including constitutional reasons, the court may allow the law of more than one State to be applied with respect to a party, claim, or other element of an action." H.R. 2450, 102d Cong., 1st Sess. § 6 (1991). Outside of this exceptional case, however, the court would not be authorized to depart from the "law of a single jurisdiction" rule.

cated. In the ordinary conflicts tort case, the courts will continue to apply interest analysis under the modern choice-of-law consensus. But in mass tort cases, there will have been an unfortunate return to the "place of the wrong rule."

III. INTEREST ANALYSIS AND STATE SOVEREIGNTY

I now want to relate the interest analysis approach to choice of law, and the relevance of policies and interests in the choice-of-law process, to the constitutional concept of *state sovereignty*. I submit that the imposition of a federally-mandated "law of a single jurisdiction" rule in mass tort cases is inconsistent with the constitutional concept of state sovereignty; among other things, it would require the states to sacrifice the strong policies underlying their substantive tort laws by foreclosing application of a state's law when the state has a real interest in implementing its policies.

To develop this submission, I must first deal directly with the question of whether states do have "real" interests in having their rules of substantive tort law applied in litigation between private litigants, such as in mass tort cases. Critics of the interest analysis approach, such as Professor Juenger, argue that the approach is conceptually flawed because it proceeds on the assumption that states have governmental interests in applying rules of substantive law to litigation between private persons. Professor Juenger insists that states do not have such governmental interests, and that this being so, to base an approach to choice of law on the implementation of non-existent governmental interests is conceptually unsound.⁴⁹ Professor Juenger draws a distinction between what he calls "real" and "spurious" governmental interests.⁵⁰ "Real" governmental interests refer to a state's fiscal and proprietary interests, such as those connected with revenue, escheat, boundary disputes, and water rights.⁵¹ The governmental interests that are the basis of the interest analysis approach, says Professor Juenger, are "spurious," because they do not involve a state's proprietary or fiscal interests.⁵² This being so, the very notion

⁴⁹ See Friedrich K. Juenger, *Governmental Interests—Real and Spurious—in Multistate Disputes*, 21 U.C. DAVIS L. REV. 515, 518-28 (1988).

⁵⁰ *Id.* at 518.

⁵¹ *Id.* at 518-28.

⁵² *Id.*

of governmental interests as the basis for resolving choice-of-law problems is highly implausible.⁵³

In replying to this criticism of lack of governmental interests by Professor Juenger, I maintain that states do have "real" interests in having certain laws applied in disputes between private litigants,⁵⁴ and that with respect to these laws, it is indeed proper to speak of governmental interests. Let me start off with regulatory laws, such as federal antitrust or securities laws. Professor Juenger recognizes that the United States has a "real" governmental interest in the application of these kinds of laws.⁵⁵ However, while the United States can enforce the antitrust and securities laws directly in a criminal or civil action against the offending party, private parties injured by a violation of those laws can likewise enforce them by bringing a civil action against the offending party.⁵⁶ For example, Congress has encouraged such enforcement of the antitrust laws by providing for the recovery of multiple damages and attorney's fees by prevailing plaintiffs.⁵⁷ Regulatory laws such as these directly implicate the social engineering function of law,⁵⁸ and the governmental interest of the United States in implementing the policies reflected in the antitrust and se-

⁵³ *Id.*; see also Friedrich K. Juenger, *Governmental Interests and Multistate Justice: A Reply to Professor Sedler*, 24 U.C. DAVIS L. REV. 227, 227-29 (1990).

⁵⁴ At the same time, I have also insisted that the premise of the interest analysis approach to choice of law is *not* that the purpose of conflicts law is to advance a state's governmental interest. Rather, I maintain that the underlying premise of interest analysis as an approach to choice of law is that consideration of the policies and interests of the involved states is the most rational and functionally sound method of resolving the choice-of-law issues in private party litigation. I further maintain that the rationality justification for the interest analysis approach exists independently of the fact that states have real interests in applying their law in litigation between private parties. "Precisely because it is rational to make choice-of-law decisions with reference to the policies and interests of the involved states, the application of the interest analysis approach generally will produce functionally sound and fair results." Sedler, *Response to Juenger*, *supra* note 8, at 880. However, when I seek to relate interest analysis to the concept of state sovereignty, I must deal directly with the question of whether states do have "real" interests in having certain laws applied in disputes between private litigants.

⁵⁵ In the context of discussing the extraterritorial application of federal regulatory laws, Professor Juenger says that, "no one questions the reality of foreign and domestic interests that are at loggerheads when, for instance, the United States proceeds against restrictive trade practices that are lawful in the defendant's home country." Friedrich K. Juenger, *Constitutional Control of Extraterritoriality?: A Comment on Professor Brilmayer's Appraisal*, LAW & CONTEMP. PROBS., Summer 1987, at 39, 42.

⁵⁶ See, e.g., 15 U.S.C. §§ 77k, 77l (1988) (dealing with private right of action for various securities frauds).

⁵⁷ See, e.g., 15 U.S.C. § 15 (1988) (allowing recovery of treble damages and reasonable attorney's fees in private antitrust suits).

⁵⁸ For a discussion of the state's interest in the enforcement of laws involving the "social engineering" function, see AMOS SHAPIRA, *THE INTEREST APPROACH TO CHOICE OF LAW* 64-66, 72-73 (1970).

curities laws is directly advanced when these laws are invoked by an injured party in a private action brought against an alleged violator.⁵⁹ An equally clear example of a "real" governmental interest is when the state relies on the injured party to pursue private litigation for intentional torts, instead of criminal prosecution, in order to deter and redress violations of personal security. For example, if two spouses from State X, which still recognizes spousal immunity, are involved in an altercation in State Y, which does not, it cannot be doubted that State Y has a "real" governmental interest in applying its law to impose liability on the battering spouse.

My point then is that it must be recognized that governments have a spectrum of interests with respect to their rules of substantive law; the strength of the government's interest with respect to the application of a particular rule of substantive law is not conclusively, or even significantly, determined by whether that interest is being implemented by the government itself or by private persons in the context of private litigation. Depending on the nature of the particular rule of substantive law involved, a state may have as "real" an interest in having its law applied in litigation between private persons as it does in a case in which the state itself is a party. It is precisely because so many conflicts tort cases do present a conflict between laws reflecting strong policies of the involved states that courts make the choice-of-law decision in these cases with reference to those policies. Likewise, the forum in such a case is unwilling to displace its own law when it has a real interest in applying its law to implement its own policy. States, then, can have "real" interests in the application of their law in litigation between private persons.

This "real" governmental interest is present with most rules of substantive tort law. Perhaps the "real" governmental interest is clearest with respect to tort rules reflecting regulatory policies, such as rules of products liability law that impose strict liability on manufacturers and provide for the award of punitive damages.⁶⁰ However, I submit that the "real" governmental interest is no less clear with respect to the tort rules that govern *all* aspects of enterprise liability. In this country, tort law, rather than social insurance, is still the pri-

⁵⁹ See *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401 (1968) (per curiam) (discussing vindication of public interests by private litigants in the enforcement of civil rights laws).

⁶⁰ In *In re Disaster at Detroit Metro. Airport* on August 16, 1987, 750 F. Supp. 793 (E.D. Mich. 1989), the Court held that California law, imposing strict liability and allowing the recovery of punitive damages in product liability cases, reflected a "producer regulatory policy," *id.* at 801, and thus should be applied against the California manufacturer that manufactured the aircraft involved in the crash in Michigan.

mary method of providing compensation for accident victims. For this reason, a state can have a "real" governmental interest in having its tort law applied to implement the compensatory policy reflected in that law in the same manner as it would have a "real" governmental interest in applying its social insurance law to provide compensation for its residents who have been injured in accidents.⁶¹ That "real" governmental interest in having its tort law applied is implicated whenever a resident of that state is involved in an accident because the social and economic consequences of the accident and of imposing or denying liability will be felt by the victim in that state. Conversely, a state's interest in applying the defendant-protecting elements reflected in its tort law is implicated whenever the defendant is a resident of that state because the consequences of imposing or denying liability will be felt by the defendant and the defendant's insurer in that state.⁶² Thus, most rules of substantive tort law do reflect strong policies. The involved states will indeed have a "real" governmental interest in having their rules of substantive tort law applied to implement those policies in particular cases.

We now return to the concept of state sovereignty and the impact of a federally-mandated "law of a single jurisdiction" rule in mass tort cases. Such a rule implicates state sovereignty in two ways. First, it deprives the states of their power to promulgate the rules governing disputes between private parties in mass tort cases. Second, and more importantly for present purposes, it would require that the states sacrifice the strong policies underlying their substantive tort laws by denying the application of a state's law in cases where the state would have a real interest in implementing its policy.

The significance of state sovereignty in the American constitutional system and congressional respect for state sovereignty has been detailed elsewhere and will only briefly be summarized here.⁶³ In American constitutional theory, the sovereignty formerly possessed by the

⁶¹ It may not be entirely coincidental that Currie frequently looked to the Supreme Court's constitutional decisions recognizing a state's interest in applying its workers' compensation law to injured workers, such as *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939), and *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935), in developing the interest analysis approach. See, e.g., CURRIE, *supra* note 5, at 160-63, 181-83, 201-14, 259-66.

⁶² In *In re Disaster at Detroit Metropolitan Airport*, the court held that Michigan had a "real" interest in applying its own law disallowing punitive damages to all the punitive damages claims against Northwest in order to protect Northwest (which uses Detroit Metropolitan Airport as a "hub") from such liability in an accident arising out of Northwest's Michigan business activity. *In re Disaster at Detroit Metro. Airport*, 750 F. Supp. at 805-07.

⁶³ See Sedler and Twerski, *Sacrifice Without Gain*, *supra* note 20, at 82-87.

British Crown over domestic matters devolved upon each of the states at the time of Independence. Consequently, the states have the primary responsibility for developing the legal rules that govern disputes between private persons and adjudicating such disputes in their courts. While Congress has the power to override or displace state law, as a matter of federal supremacy, Congress has recognized that any exercise of federal power should be undertaken with due regard for the traditional sovereignty of the states and their role in the federal system.⁶⁴

Congress' regard for the traditional sovereignty of the states is most prominent in relation to the states' power to develop legal rules governing disputes between private persons and to adjudicate such disputes in their courts. Congress has long recognized this fundamental principle of our federal system by requiring the application of state law in diversity cases under the Rules of Decision Act,⁶⁵ which includes, of course, the application of state conflicts law.⁶⁶ Congress has also limited the scope of diversity jurisdiction in the federal courts by requiring complete diversity rather than the constitutionally permissible "minimal diversity."⁶⁷ It has also done so by providing that a corporation is a citizen of the state where it is incorporated as well as the state where it has its principal place of business, and by, in 1988, increasing fivefold the jurisdictional amount in diversity cases from \$10,000 to \$50,000.⁶⁸

Congressional respect for state sovereignty in this area is also evidenced in the Supreme Court's extreme reluctance to find federal preemption of the states' power to promulgate legal rules governing the disputes between private persons.⁶⁹ Finally, Congress has been unwilling to use its power over interstate commerce to enact federal substantive law, such as a national products liability law, that would displace state law applicable to the resolution of disputes between

⁶⁴ See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-52 (1985).

⁶⁵ 28 U.S.C. § 1652 (1988).

⁶⁶ See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). The underlying premise of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and the "outcome-determinative" test reflected in its progeny, is uniformity of result between federal and state courts in diversity cases. To promote uniformity of result, whenever there is a transfer of venue from one federal court to another under 28 U.S.C. § 1404, the transferee court must apply the law, including the conflicts law, that would have been applied by the transferor court had the case remained there. *Ferens v. John Derre Co.*, 494 U.S. 516 (1990); *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

⁶⁷ See 28 U.S.C. § 1332 (1988); see also *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 531 (1967) ("Article III poses no obstacle to . . . diversity [jurisdiction] so long as any two adverse parties are not co-citizens.").

⁶⁸ See 28 U.S.C. § 1332 (1988).

⁶⁹ See, e.g., *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 413 (1973).

private persons, even though these disputes may significantly affect interstate commerce. Nor, of course, has Congress used its powers under the Commerce Clause or the Full Faith and Credit Clause to impose uniform choice-of-law rules on the states.

Congress then has been extremely solicitous of the primary responsibility of the states in our federal system which is to promulgate the law applicable to disputes between private persons and to adjudicate such disputes in their courts. The mandatory removal of mass tort cases from the state courts and their consolidation before a single federal court, without more, would subvert this function of the states in our federal system by depriving them of the power to hear cases that would otherwise come within state court jurisdiction.⁷⁰ Moreover, as I have demonstrated, the imposition of a federally-mandated "law of a single jurisdiction" rule in such cases would be a slightly modified "place of the wrong" rule, subverting this function of the states in the most drastic way possible.

First, in mass tort cases it would destroy the basic premise of federal diversity jurisdiction: in a diversity case, there should be uniformity of result between state and federal courts. Under the "law of a single jurisdiction" rule, the states would be completely deprived of their power to determine the substantive law to be applied to the disputes between private persons in mass tort cases.⁷¹ Second, as stated above, the imposition of a federally-mandated "law of a single jurisdiction" rule would require the states to sacrifice the strong policies reflected in their substantive tort laws by denying application of a state's law in cases where the state would have a real interest in implementing the policy underlying that law. As I have demonstrated, just as state policies and interests were completely irrelevant under the "place of the wrong" rule of the traditional approach, they are likewise completely irrelevant under the slightly modified "place of the wrong" rule that the federal court would be compelled to apply because of constitutional constraints on selecting the "law of a single jurisdiction" in a mass tort case.

In my previous example of the California-Michigan plane crash involving the New York manufacturer, the "law of a single jurisdiction" rule would preclude the application of California's victim-favoring products liability law to determine the tort claims of the survivors of the California passengers against the New York manufacturer be-

⁷⁰ Today, cases may be brought in, or removed to, the federal courts only when there is "complete diversity" between all plaintiffs and all defendants. The proposed federal law would allow removal on the basis of "minimal diversity" only. See *supra* note 21.

⁷¹ See the discussion of this point in Sedler & Twerski, *Response*, *supra* note 20, at 627-28.

cause some of the victims of the crash were from Michigan. Likewise, I have used the example of the Wisconsin bus trip to Indiana, in which Wisconsin law could not be applied to allow the Wisconsin victims to receive full recovery against the Wisconsin defendant, Greyhound, for the accident in Indiana, because an Indiana victim and an Indiana driver were also involved in the accident. Two other examples will now be used in which two different states both have a real interest in applying their own law to determine the claims of different parties arising from the same mass tort.

The first example is a single disaster case.⁷² To attend an Elks convention, twenty members of the Elks Club in Colorado charter a bus in Denver for a trip to Phoenix, Arizona. The bus company, Colorado Coaches, Inc., is a Colorado corporation doing business mostly within the state. In Phoenix, thirty Arizona Elks members board the bus for a local sightseeing trip. Due to the negligence of the bus driver, the bus hits a culvert, causing the bus to overturn. All of the passengers suffer serious and debilitating injuries. A 1987 Colorado law limits recovery for non-economic injuries to \$250,000 for each plaintiff. There is no such limitation under Arizona law.

A functionally sound result in this case, one respecting the interests of both Colorado and Arizona, is for the Arizona plaintiffs to obtain unlimited recovery under Arizona law, but for the Colorado plaintiffs to be limited to the \$250,000 limitation on non-economic loss in accordance with Colorado law. Colorado law should apply in the suit between the Colorado plaintiffs and the Colorado defendant because the parties are residents of the same state, and the social and economic consequences of the accident, and of allowing or limiting recovery, will be felt by the parties in that state. This is the result that is likely to obtain in practice today, regardless of whether the suit is brought in Arizona or in Colorado.⁷³

The Arizona plaintiffs, however, should obtain unlimited recovery in accordance with Arizona law. Arizona's policy of allowing unlimited recovery will be advanced whenever the victim is a resident of Arizona. The application of Arizona law to allow unlimited recovery is fully fair to the defendant since the accident occurred in Arizona on a local sightseeing trip. The Arizona plaintiffs will bring their suit in Arizona and the Arizona court will apply its own law allowing recovery.⁷⁴

⁷² See Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 20, at 87-90.

⁷³ See the discussion of this point in Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 20, at 88-89.

⁷⁴ *Id.* at 87-88.

The overall result, with the Arizona plaintiffs obtaining unlimited recovery under Arizona law, and the Colorado plaintiffs being limited to the amount permitted under Colorado law, is thus functionally sound and fair to all the parties involved. It is irrelevant in this regard that the Arizona plaintiffs and the Colorado plaintiffs were victims in the same mass tort. The "mass" nature of the tort has nothing whatsoever to do with the consequences of that tort for the individual victims or the interests of the victims' home states in applying their respective laws to determine the victims' right to tort recovery. The consequences of this mass tort will be felt by the victims in their home states and it is the law of their respective home states that should apply to determine their right to recover.⁷⁵

However, the "law of the single jurisdiction" rule would require the federal court to apply either the law of Arizona, where the accident occurred, or the law of Colorado, where the defendant has its principal place of business,⁷⁶ to determine the claims of *both* the Arizona plaintiffs and the Colorado plaintiffs. This would mean that either the Arizona plaintiffs would be denied unlimited recovery, or more likely, because the accident occurred in Arizona, the Colorado plaintiffs would get a windfall under Arizona law that would not be available to them according to the law of their home state or if suit had been brought in either the Colorado or Arizona courts.

There is no reason whatsoever to deny the Colorado defendant the protection that the Colorado legislature sought to provide for it, while giving the Colorado plaintiffs a windfall denied to them by the Colorado legislature. The application of the "law of a single jurisdiction" rule in this case unjustifiably defeats the strong policy of Colo-

⁷⁵ Proponents of the application of the "law of a single jurisdiction" in mass tort cases contend that inconsistent and unfair results obtain when different laws are applied to similarly situated parties involved in the same tort, and that the application of the law of the same state to determine the rights of the parties will promote equality of result. Kastenmeier & Geyh, *supra* note 16, at 551-52. What this argument fails to comprehend is that it trades vertical equality for horizontal equality, doing so at the expense of the policies and interests of the parties' home states. The accident victims from Colorado and Arizona in this mass tort case are similarly situated only in the sense that they have been involved in the same accident. They are not similarly situated with respect to the policies embodied in the laws of the different states nor the interests of the involved states in having their laws applied to implement those underlying policies. The victims from the different states are treated equally when each set of victims gets the protection, or lack of it, provided by the law of each set of victims' home state. See the discussion of "Horizontal Versus Vertical Inequality" in Sedler & Twerski, *Response, supra* note 20, at 635-37.

⁷⁶ Because only one defendant is involved in this single disaster case, it is constitutionally permissible to apply the law of the defendant's home state to determine the claims of all the victims. This is one situation where the court would not be required to apply the law of the place of the wrong as the "law of a single jurisdiction."

rado as to Colorado parties, without advancing any legitimate policy of Arizona.

The second example involves the multi-exposure or "mass toxic tort."⁷⁷ To simplify things, assume that only one manufacturer has produced the product and that it caused injuries to residents of all fifty states. Also assume that the products liability law of half the states is more favorable to victims while the products liability law of the other half is more favorable to manufacturers. Finally, assume that the law of the state of manufacture is more favorable to manufacturers. In this circumstance, where the law of the plaintiffs' home state is more favorable to plaintiffs, the plaintiffs will bring suit in their home state, which will apply its own law because it has a real interest in applying its plaintiff-favoring law for the benefit of its resident plaintiffs. Where the law of the plaintiffs' home state is favorable to manufacturers, there is simply no conflict of laws on the point in issue because the law of the state of manufacture is also more favorable to manufacturers. In this "mass toxic tort" case, a functionally sound and fair result is to permit each set of plaintiffs to receive the protection, or lack of it, provided by the law of their home states. Because the manufacturer does business on a nationwide basis, it can foresee the application of the law of every state. Where the law of the victims' home state is plaintiff-favoring, that state has a real interest in applying its law for the benefit of its resident plaintiffs and should be permitted to do so.

Under the "law of a single jurisdiction" rule, the only applicable law that could constitutionally be selected in this situation is the law of the manufacturer's home state, with its manufacturer-protecting policy. This is because the law of the state where one set of victims resides cannot constitutionally be applied to determine the claims of another set of victims residing in another state. Thus, the application of the "law of a single jurisdiction" rule here will prevent the states whose laws favor plaintiffs from applying their plaintiff-favoring law for the benefit of their resident plaintiffs.

The examples we have given can be multiplied many times over. In the interstate accident situation, as I have said many times, the primarily interested states are the parties' home states where the consequences of the accident and of allowing or denying recovery will be felt by the parties. The ability of each state to apply its law in private litigation where it has an interest in applying its law to implement the policy reflected in that law is an important attribute of

⁷⁷ See Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 20, at 93-94.

state sovereignty. The requirement that all claims arising out of a mass tort be determined by the "law of a single jurisdiction" sacrifices vital state interests in the name of "efficiency and consistency." The regard for state sovereignty that is so fundamental in our constitutional system, and that has been so long recognized by Congress, strongly argues against denying the states the power to apply their own law to advance their own policies and interests, notwithstanding that a mass tort is involved.⁷⁸

⁷⁸ As stated previously, because the focus of this Article has been on the impact of a federally-mandated "law of a single jurisdiction" rule on modern developments in choice of law and on state sovereignty, I have not addressed the independent question of whether consolidation of mass tort cases before a single federal court is necessary or desirable. Rather, my submission has been that if consolidation is going to be required, it should be accomplished without displacement of state choice of law. Under this approach, where the mass tort cases have been consolidated, the federal court should be required to follow state choice of law and reach the same choice-of-law result that would be reached by the courts of the state from which the case has been transferred.

The federal judge handling the consolidated cases would be performing the same task that the judge now performs in dealing with cases that have been consolidated by the Judicial Panel on Multidistrict Litigation. The number of separate choice-of-law decisions that the judge would have to make in dealing with the consolidation of a large mass tort case would perhaps be increased, but there is no reason to believe that the federal judge would not be fully capable of applying the different conflict-of-laws rules of each of the states where the separate suits have been filed. See Sedler & Twerski, *Response*, *supra* note 20, at 632-34.

The ability of a federal judge to resolve choice-of-law issues under the different conflict laws of a number of states in a mass torts case is illustrated by the disposition of the choice of law issues by Chief Judge Julian Abele Cook, Jr. of the United States District Court for the Eastern District of Michigan in *In re Disaster at Detroit Metropolitan Airport* on August 16, 1987, 750 F. Supp. 793 (E.D. Mich. 1989), portions of which I have previously discussed. That case, it will be recalled, resulted from the crash on takeoff from Detroit Metropolitan Airport of a Northwest Airlines DC-9, designed and manufactured by McDonnell-Douglas Corporation on a flight from Detroit to Phoenix, Arizona. *Id.* at 795. All on board were killed, except for a four-year-old child, and other persons on the ground were killed or injured. *Id.* One hundred and fifty seven claims were filed in federal courts in Michigan, Arizona, California, and Florida. *Id.* at 796. For the most part, the plaintiffs were residents of the state where they filed their claims. The plaintiffs asserted a negligence claim against Northwest and a design defect claim against McDonnell-Douglas, seeking compensatory and punitive damages against both defendants. *Id.*

When the case was consolidated for trial before the United States District Court for the Eastern District of Michigan, Chief Judge Cook resolved the choice-of-law issues by identifying the substantive law questions on which the laws of the involved states differed, and deciding what state's law would be applied on each of the substantive law questions by the courts of each of the four states where separate federal suits had been filed. The two substantive law questions on which the laws of the involved states differed related to the standard of liability in design defect cases and the availability of punitive damages. *Id.* at 800, 806-07.

As we have discussed previously, the issue of the standard of liability in design defect cases and the recovery of punitive damages against Northwest presented a false conflict. California, the state of manufacture, had a real interest in applying its law to implement the "producer regulatory" policy reflected in that law, while none of the other involved states, such as Michigan, whose law on this issue required a showing of negligence, would have any interest in applying the manufacturer-protecting policy reflected in that law for the benefit of the California

IV. CONCLUSION

The nature of tort litigation and the kinds of conflicts tort cases that were presented at the time of *Babcock* may have changed dramatically in the thirty years since *Babcock* was decided. But the choice-of-law revolution that *Babcock* sparked has resulted in a modern choice-of-law consensus in favor of an approach to choice of law in tort cases that looks to the interests of the involved states in having their laws applied to implement the underlying policies reflected in those laws. Those policies and interests are no less present and of no less importance in the mass tort case than they were in the more simple conflicts tort cases of the *Babcock* era. Considerations of state sovereignty also require respect for the traditional function of the states to develop legal rules governing disputes between private persons and to adjudicate such disputes in their courts. Most significantly, considerations of state sovereignty demand that the states not be forced to sacrifice the strong policies underlying their substantive tort laws by a federally-mandated "law of a single jurisdiction" rule that would deny the application of a state's law in cases where the state would have a real interest in implementing its policies.

manufacturer. Thus, Chief Judge Cook predicted that all of the four states would apply California law on this issue. *Id.* at 802-04.

On the issue of recovery of punitive damages against Northwest, Michigan had a real interest in applying its law disallowing recovery of punitive damages in favor of Northwest in order to protect Northwest, which uses Detroit Metropolitan Airport as a "hub." *Id.* at 807. Chief Judge Cook also predicted that California, following the "comparative impairment" approach, and Arizona and Florida, following the state of the most significant relationship approach, would apply Michigan law on this issue. *Id.* at 808-11. This prediction seems to be clearly correct. It is questionable whether the victim's home state can assert a legitimate interest in applying its law allowing punitive damages to conduct of a defendant occurring in another state. It is likewise questionable whether the application of the law of the victim's home state in this circumstance would be constitutionally permissible.

As it turned out, despite the fact that the cases were filed in four different federal courts, under the conflict-of-laws rules of the four different states, the choice-of-law results would be the same in this case. All states would apply California law with respect to the issue of design defect liability and punitive damages in the claims against McDonnell-Douglas, and all the states would apply Michigan law with respect to the punitive damages claims against Northwest. Perhaps because of the guidance furnished by Chief Judge Cook's choice-of-law decisions, all of the wrongful death and personal injury claims against both defendants were settled without trial.

The resolution of choice-of-law issues with reference to the conflicts law of the states from which the cases have been transferred is also facilitated by the fact that under the modern choice-of-law consensus, the courts have tended to reach fairly uniform results in the different fact-law patterns that are presented in conflicts tort cases. Therefore, it is not surprising that Chief Judge Cook found that Michigan, California, Arizona, and Florida would all reach the same result with respect to the choice-of-law issues presented in that case.

Mass tort cases may legitimately raise concerns about efficiency and consistency. But these concerns should not cause us to completely overturn the entire choice-of-law revolution of the last thirty years and unjustifiably intrude on state sovereignty by denying the states the power to advance the strong policies of their substantive tort laws in mass tort cases. However we decide to address the problem of mass torts litigation in the United States, we should categorically reject the proposition that all of the issues in a mass torts case must be determined by a federally-mandated "law of a single jurisdiction."